U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC-98-066-52743 Office: California Service Center Date: AUG 10 2000

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993

IN BEHALF OF PETITIONER:

[redacted]

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, California Service Center. An appeal from the decision was summarily dismissed by the Associate Commissioner for Examinations. The matter is again before the Associate Commissioner on motion to reconsider. The motion to reopen and/or reconsider will be dismissed. The Service, however, will reopen the proceeding *sua sponte* and will examine the matter on its merits. The previous decision to deny the petition will be affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993. The director denied the petition finding that the petitioner failed to establish eligibility on several grounds. The director found that the structure of the petitioner's investment agreement, consisting of a down payment with additional annual payments scheduled over a five-year period, did not constitute a qualifying investment. The director also found that the structure of the petitioner's investment did not constitute a qualifying "at risk" investment for the purposes of this proceeding finding that the investment agreement's provisions for reserve funds, escrow funds, and guaranteed returns prior to completion of the investment rendered those sums not acceptable as a part of the minimum capital investment; that the redemption agreements negated the at-risk element; and that the security interest of the promissory note was not perfected as required. The director further found that the petitioner failed adequately to document the source of his funds and thereby failed to establish that the funds were obtained through lawful means. Finally, the director found that the petitioner had not adequately demonstrated that his investment would result in the requisite job creation.

The petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, on January 6, 1998. The petition was denied in a decision dated November 21, 1998. Counsel for the petitioner timely filed an appeal from the decision on December 16, 1998, stating that an appellate brief would be forthcoming on or before January 13, 1999. The Associate Commissioner for Examinations, by and through the Director, Administrative Appeals Office ("AAO"), summarily dismissed the appeal pursuant to 8 C.F.R. 103.3(a)(1)(v) on February 8, 1999, finding that the petitioner had failed to submit an appellate brief specifying an error of law or fact in the underlying decision.

On motion, counsel contends that a brief was timely submitted by Federal Express and was received at the AAO on January 15, 1999. Counsel states that proof of the timely submission is attached and argues that the summary dismissal was erroneous. Counsel submitted a copy of the sender's copy of [redacted] dated January 14, 1999, addressed to the AAO. Counsel, however, failed to submit a

receipt or any proof that the appellate brief was timely received by the AAO as claimed. Absent proof that the brief was timely received, the motion must be and is hereby dismissed. In its discretion, the Service will reopen the proceeding on its own motion and reconsider the matter on its merits.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner is described as a native of Hong Kong, a national of the United Kingdom, and a resident of Taiwan currently residing temporarily in the United States as an F-1 nonimmigrant student. The petitioner filed Form I-526 indicating that the petition is based on an investment in a new business in a targeted employment area eligible for downward adjustment of the minimum capital investment to $500,000 and indicating that the new business is a "regional center" eligible for participation in the Immigrant Investor Pilot Program. The petitioner contended that he is one investor, in a plan to recruit up to 30 investors, in [redacted] Limited Partnership (the "Partnership"). The general partner of [redacted] LP is [redacted] (the "General Partner"). The petitioner also stated that the General Partner is itself designated as a "regional center" that is eligible to satisfy the employment creation provision by demonstrating indirect employment creation through revenues generated from increased exports. The petitioner stated that he is in the process of investing $500,000 into the Partnership. The petitioner's investment of capital was in the form of a promissory note with the Partnership.

The petitioner submitted a letter dated August 15, 1997, from the Immigration and Naturalization Service's (the "Service") Assistant Commissioner for Benefits designating the General Partner a

[redacted]

regional center. Pursuant to the terms of the designation, aliens could file petitions for new commercial enterprises located within the General Partner's development area, which was identified as the former military bases in Sacramento, San Bernardino, and Riverside Counties, California. The letter explained that, to qualify for indirect employment creation, a petitioner would have to show that the new commercial enterprise was located at such a base and that the claimed employment was, or would be, created through revenues generated from increased exports.

On appeal, counsel broadly argued that the center director's denial was based on the findings in Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 1998), among three other precedent decisions pertaining to the immigrant investor classification, and that the decisions ignore over five years of well-settled Service interpretation of the immigrant-investor provisions, that the precedents improperly promulgated new rules, and that the precedents were illegally applied retroactively. Counsel further asserted that the center director's denial was contrary to previous similar petitions approved by the center director, that the precedent decisions were contrary to past appellate decisions of the AAO, and that the decisions were contrary to past Service memorandums and informational letters responding to inquiries.

Counsel essentially argues that the precedent decision(s) on which the director relied was violative of the Administrative Procedures Act (APA), 5 U.S.C. § 553, and constituted improper rule making. The argument is not persuasive.

The immigrant investor classification was first introduced into law with the Immigration Act of 1990 and the Service thereafter published the current implementing regulations on the classification following the notice and comment procedures required by the APA. Petitions seeking the benefit were not widely received for the first several years after enactment and the Service did not publish any binding precedent interpreting the application of those regulations to specific fact patterns until sufficient specific fact patterns were identified as involving complex or novel issues of law requiring clarification beyond the plain language of the regulations. The Service then published Matter of Soffici in June of 1998, followed by Matter of Izumii, Matter of Hsiung, and Matter of Ho in July of 1998.

Contrary to counsel's assertion, published precedent decisions represent the Service's interpretation of the statute and the regulations and are used to provide guidance in the administration of the Act. They do not represent rule making requiring notice and comment pursuant to the provisions of the APA. The Associate Commissioner publishes precedents as deemed necessary under authority delegated by the Commissioner of the Service and the Attorney General. 8 C.F.R. 2.1. Precedent decisions are binding

on all Service officers. 8 C.F.R. 103.3(c). The center director therefore was bound to apply the relevant precedents in adjudicating the instant petition. Neither was it improper to apply the precedents to a petition that was filed prior to the issuance of the precedent. The precedents interpreted the existing regulations. Those regulations were in effect prior to the filing of the instant petition. Therefore, the center director acted properly in applying the findings in Matter of Izumii to the instant case or to any pertinent case before her.

The fact that immigrant investor petitions were adjudicated by the Service and that some were erroneously approved prior to the precedents being issued has no bearing on the director's findings. The Service is not bound to treat acknowledged past errors as binding. See Sussex Engineering, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987). In the same manner, the AAO is not bound by past unpublished administrative decisions which may have been issued in error. Nor are Service officers inexorably bound by internal memoranda or by written responses to inquiries from the legal community. The publication of a binding precedent decision in a subject area supersedes any previous nonbinding guidance in that subject area. The four pertinent precedent decisions were properly issued and the center director was correct in relying on those decisions.

At issue in the director's decision was whether the petitioner has made a qualifying investment of capital.

8 C.F.R. 204.6(e) states, in pertinent part, that

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars.
>
> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and

operating a personal residence.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence

> of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner stated that his investment of $500,000 was in the form of a promissory note. The terms of the note provide for an initial deposit of $300,000 into a trust account, to be released to the partnership upon approval of the immigrant visa, four annual payments of $35,000, and a final "balloon" payment of $60,000.

Relying on Matter of Izumii, supra, the director held that the petitioner must substantially complete payments on the promissory note prior to the expiration of the two-year conditional period of permanent residence in order for the promissory note to be considered a qualifying contribution of capital. See 8 C.F.R. 216.6(a)(4)(iii). The director rejected the five-year payment schedule offered by the petitioner finding that the petitioner would not have substantially completed making the necessary investment at the expiration of the two-year period of conditional residence and, in fact, would have "invested" only $370,000 as of that date.

On appeal, counsel argued, in pertinent part, that:

> There is absolutely no statutory or regulatory requirement that "in the process of investing" must be "nearly" completed or must be "substantially" completed within the two-year period. The statutes permit investors to be in the process of investing at the time of filing the I-526 petition and also at the time of the filing of the I-829 petition to remove the two-year condition.

Contrary to counsel's argument, the regulations relating to the filing of an I-829 petition at 8 C.F.R. 216.6(c)(1)(iii) require that the alien must have "substantially met the capital investment requirement" by the end of the two-year conditional period. In Matter of Izumii, it was held that where a promissory note is submitted as evidence that the alien is "in the process of investing" the required capital, the terms of payment on the promissory note must be substantially completed within the two-year conditional period in the same manner as the payments on a cash investment must be substantially completed within the two-year period. The Service cannot approve a petition for immigrant investor classification where the record shows that the petition for removal of conditions could not be approved. It is concluded that the terms of the petitioner's promissory note providing that only $370,000 of the $500,000 minimum investment would be completed as of the termination of the two-year conditional period would not be "substantially met" and therefore do not constitute a qualifying investment of capital.

The director also found that other terms of the petitioner's investment plan rendered it ineligible for the benefit sought. The investment plan advanced by the petitioner is similar to the investment plan rejected in Matter of Izumii. Specifically, the provisions providing for partnership expenses, reserve funds, guaranteed payments, and redemption agreements were found to be unacceptable provisions of a qualifying at-risk investment.

Partnership Expenses

Regarding the partnership expenses, the petitioner furnished a letter from the [redacted] dated November 20, 1997, verifying that $300,000 had been received and deposited into a custody account with [redacted] on behalf of their law firm, as Trustee. According to section 2.A(3) of the investment agreement, the petitioner agreed to instruct counsel, as trustee of the escrow account, "immediately to release to the Partnership US$30,000 as a refundable advance for initial operating needs of the Partnership; and that if, as and when my visa application is approved by the Department of State in the case of consular processing abroad the aforementioned balance of the bank escrow account [$270,000] will be transferred to the Partnership and simultaneously I will be admitted into the Partnership as a Limited Partner."

The payment of initial Partnership expenses and costs is not the type of profit-generating activity contemplated by the regulations; it does not evidence the placement of capital at risk for the purpose of generating a return on the capital. See 8 C.F.R. 204.6(j)(2). As stated in Matter of Izumii, supra, if the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the petition is based. The $30,000 paid to the Partnership for unspecified overhead expenses is not money available for investment in job creating activities. Therefore, the petitioner's investment plan would not constitute an investment of at least $500,000 into an employment creating enterprise, but something less.

On appeal, counsel contends that Matter of Izumii and the center director's decision were in error. Counsel argues, in pertinent part, that:

> The INS has failed to recognize that investing capital for the purpose of generating a return on the capital is not necessarily the same as job creation. Capital can be used for purposes of generating a return, be at commercial risk, and have nothing to do with job creation. The law does not require 100% of the capital to be used for job creation; it just requires 100% of the capital to be at risk and the jobs be created.

* * *

> The AAO/INS rule that the full amount must be made available to the enterprise "most closely responsible" for creating the employment would require investors to directly invest in the export businesses themselves. Such a rule ignores INS' own designation of regional centers and ignores permissible indirect job creation through increased export sales and improved regional productivity as evidenced by reasonable methodologies.

This argument is not persuasive. First, as was discussed above, the terms of the petitioner's investment were rejected in Matter of Izumii, supra, and the Service is bound by that decision. Second, counsel's discussion of risk and job creation is a mischaracterization of the director's finding. According to the Investment Agreement, the release of $30,000 was for unenumerated "initial expenses of the Partnership." 8 C.F.R. 204.6(j(2) requires that the petitioner place "the required amount of capital at risk for the purpose of generating a return on the capital placed at risk." (Emphasis added.) In Matter of Izumii the Associate Commissioner explained that the Service is not prohibiting the payment of expenses of the partnership or even of the immigration-related fees, but that any funds dedicated to such expenses could not be included as part of the minimum capital contribution which must be dedicated to generating a return. It was further explained that particularly in cases under the Pilot Program where the nexus between the investment and the job creation were already tenuous, the Service does not wish to allow for layers of holding companies, each deducting operating expenses from the initial investment, so that the entity that is ultimately responsible for job creation would have the benefit of significantly less than the "required amount" of capital.

The statute requires that a petitioner satisfy the minimum requirement for both the level of capital investment and the level of employment creation in order to qualify for immigrant investor status. Obviously there is no upper limit for either requirement. The specific levels of actual investment and actual job creation are left up to the market and to the nature of the new commercial enterprise that was created. The fact that an investor might create the minimum number of jobs with less than the minimum amount of capital investment is irrelevant. Clearly, both requirements must be satisfied. Therefore, the Service holds that the petitioner must demonstrate that at least the minimum required amount of capital be made available to the entity most closely responsible for job creation, regardless of any initial expenses such as legal fees or immigration-related fees.

Third, contrary to counsel's assertion regarding regional centers,

the Immigrant Investor Pilot Program provides relief from the statutory requirement of direct employment creation and allows in its place indirect employment creation if such employment is the result of increased export activity. The Pilot Program does not exempt regional centers from either the minimum investment amount or the minimum job creation level. The plain language of the statute requires that the petitioner invest "not less than the amount specified" in the new commercial enterprise and requires that the investment "will create full-time employment for not fewer than 10 United States citizens." § 203(b)(5)(A)(ii)&(iii) of the Act. The fact that the General Partner is a regional center does not relieve any of the limited partners from satisfying the requirements of a qualifying at-risk investment.

Reserve Funds

Regarding the reserve funds to cover additional expenses, section 4.04 of the partnership agreement states that the Partnership may deposit portions of the limited partners' capital contributions, also called reserve funds, into escrow or sub-escrow accounts. Accordingly to section 4.03(C), the reserve funds may be used to offset the expenses of the Partnership estimated to be "approximately less than 14% of the total Capital Contribution."

The director again found that any funds set aside for purposes not related to job creation could not constitute a portion of the minimum capital investment.

On appeal, counsel argued that the prohibition of such funds was misguided asserting that:

> The new commercial enterprise must be allowed to spend some money on preparation, advertising and start-up cost, the costs of incorporation, equipment purchases and leasing of premises and many other fees before it can possibly hope to create any jobs.

As noted above, the petitioner has already allocated $30,000 of his $500,000 investment for partnership expenses. The partnership agreement then allocates approximately an additional 14 percent of the total investment, or $70,000, for additional expenses. Pursuant to the partnership agreement, the creation and maintenance of these reserve funds take priority over any other use of the capital contributions. These reserve funds are, by contractual agreement, not available for purposes of job creation. The enterprise in which the petitioner is investing is described as a lending organization that will not create direct employment. The claim that the funds are necessary for advertising, equipment, and incorporation has not been substantiated. The petitioner did not submit a projected budget or any formal estimate of the actual start-up expenses of the Partnership. The expenses referred to by

counsel appear to be those incurred by the General Partner in recruiting limited partners rather than those that would be incurred by the Partnership is starting up its profit making ventures. Nevertheless, the fact that up to $100,000, or 20 percent, of the petitioner's $500,000 were allocated for operating expenses renders that amount unavailable for lending to the institutions which would be responsible for the indirect job creation. As stated in Matter of Izumii, supra, reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk. The overhead or operating expenses of [redacted] may be any amount desired and deemed appropriate by its investors, however, as discussed in the preceding section, such amounts may not be counted toward the minimum capital investment required for immigrant investor classification.

Guaranteed Payments

Regarding the petitioner's obligation to make annual payments and the Partnerships's obligation to make guaranteed returns, according to section 2.B of the investment agreement executed by the petitioner, the petitioner must make four annual cash payments of $35,000 each, totalling $140,000, commencing one year from the date he is admitted to the Partnership. Section 3 of the investment agreement, however, states, "I shall receive a return on the cash I have contributed to the Partnership in the amount of 10% per annum, payable annually, commencing one year from the date I am admitted to the Partnership as a Limited Partner and ending four years thereafter." The petitioner would also receive a share of any profits exceeding this 10 percent return. The partnership agreement explains that the percentage return is computed on the basis of the total cash contributed at the time the distribution is made.

As stated in Matter of Izumii, supra, an alien may not receive guaranteed payments from a new commercial enterprise while he or she owes money to the new commercial enterprise. In this case, the petitioner would receive at least $155,000 (10% annually x total investment to date) in annual distributions during the four years in which he is obligated to make annual payments of $35,000. This amount is in excess of the total $140,000 contribution of the annual payments. Under these terms the commercial enterprise would not receive an infusion of new funds from the petitioner; in fact the Partnership would pay out more in returns than the petitioner would contribute. Therefore, the four annual payments intended to represent $140,000 cannot be considered a qualifying contribution of capital toward the $500,000 target.

On appeal, counsel defended the use of the guaranteed returns arguing, in pertinent part, that:

> ...the wording of the new AAO rule does not appear to require, or even allow, the INS to "cry foul" at this early stage. The rule states that the "alien cannot receive guaranteed payments while he still owes money to the enterprise." This petitioner, however, has not yet received any guaranteed payments. The petitioner does not even become a limited partner until approval of the immigrant visa or adjustment of status....
>
> Therefore, the INS objection is premature at this point.

The fact that the petitioner has not yet received his first annual guaranteed interest payment is irrelevant. Those terms are part of the agreement(s) submitted to satisfy the capital investment requirements. Eligibility must be established at the time of filing. Because the terms of the investment agreement regarding guaranteed returns are not qualifying, the petitioner has not established that he is making a qualifying at-risk investment.

Redemption Agreement

Regarding the redemption agreement, section 4 of the investment agreement provides, "after the fifth anniversary of my admission to the Partnership, and after all payments made by me as required by the Secured Promissory note, I, as a limited partner, may exercise a sell option under which I have the right to require the Partnership to purchase from me my limited partnership interest at a price to equal to my total contributed capital, less my first four annual installment six payments, payable 180 days after the sell option is exercised." The agreement does not specify whether the final $60,000 payment must be made or whether it would be included in the sell-option price. Assuming the final payment is made, the sell-option price would be $360,000. As noted above, the petitioner would also have received $155,000 in guaranteed payments. The partnership agreement at section 8.06, also provides a buy-option whereby the General Partner, through the Partnership, may acquire each limited partner's interest "in its entirety" at any time "after 60 months following the Limited Partner's admission" for an amount equal to the sell-option price.

As stated in Matter of Izumii, supra, an alien cannot enter into a partnership knowing that he or she already has a willing buyer in a certain number of years, nor can he be assured that he will receive a certain price. Otherwise, the investment is not at-risk as in standard venture capital investments; it is nothing more than a loan, albeit an unsecured one. Therefore, prior to completing all of the cash payments under a promissory note, an alien investor may not enter into any agreement granting the investor the right to sell his or her interest back to the partnership. Id.

On appeal, counsel disputed the director's rejection of the

redemption agreement on the grounds that it was a new rule and that it was contrary to a September 10, 1993, opinion of the Service's Office of General Counsel. Counsel also argued that such "exit provisions" are common in business and that risk exists for the petitioner because the General Partner may not have sufficient funds to fulfill its obligation to buy out a limited partner on demand and because the petitioner is not required to exercise her sell-option and may not do so.

In this case, the petitioner has the absolute right to sell his interest at a fixed price, regardless of the profits or losses of the enterprise and regardless of the net worth of that interest. The General Partner also has an absolute right to buy the limited partner's interest at a fixed price regardless of the profits or losses of the enterprise and regardless of the net worth of that interest. Under such terms, in the event the enterprise is highly successful and profitable, the General Partner could purchase the limited partner's interest at a fixed price and assume total ownership of the enterprise. In the event of significant business loss, the petitioner could also recover his entire investment. Counsel submitted no evidence to substantiate the claim that redemption terms such as these are options that are common in venture capital investments. To constitute business "risk" an investment must risk both profit and loss. See Matter of Izumii, supra. Under the sell-option, the petitioner does not risk loss. Under the buy-option, the petitioner has forfeited the absolute "risk" of enjoying the potential profits of his investment. Such provisions have not been shown to be consistent with standard business practices and have been found to be inconsistent with a qualifying at-risk investment as contemplated by the statute. Id.

The additional argument that the General Partner might default on its contractual obligation to purchase the limited partner's interest is not persuasive in that it does not constitute the type of risk "in a profit-generating enterprise" within the meaning of 8 C.F.R. 204.6(j)(2). Risk of default within the investment group is not the same as risk of failure in the commercial enterprise. Furthermore, whether or not the petitioner exercises her sell-option, that option does exist and thereby negates the normal risk of the business investment.

Perfected Security Interest

As stated in Matter of Izumii, supra, a promissory note can constitute capital itself or can constitute evidence that a petitioner is in the process of investing cash. Under either circumstance, the petitioner must show that he has placed his assets at risk. That is, the assets securing the note must be specifically identified as securing the note, the assets must belong to the petitioner personally, the security interests must be perfected to the extent provided for by the jurisdiction in which

the assets are located, the assets must be fully amenable to seizure by a U.S. note holder, the assets must have an adequate fair market value, and the costs of pursuing the assets must be taken into account. Matter of Hsiung, I.D. 3361 (Assoc. Comm., Ex., July 31, 1998). Otherwise, the note is meaningless.

The director found that the petitioner's security for his promissory note, consisting of bank accounts and real property belonging to his mother, did not satisfy the above requirements.

On appeal, counsel again argued that the precedent set forth in the Hsiung decision represents an impermissible new rule. Counsel also argued that the Partnership relied on prior Service policy memorandum that the assets securing a promissory note need not be perfected and that any change in policy cannot be applied retroactively.

The argument that the published precedent decisions were improper and should be withdrawn has been addressed above. Counsel provided a quote from a June 27, 1995, Service policy memorandum stating that there is no regulatory requirement that indebtedness in these proceedings comply with Article 9 of the Uniform Commercial Code requiring that a lender perfect the security interest in assets loaned to the prospective immigrant investor. It is correct that the regulations are silent on the issue of perfecting the security interest of a promissory note. The definition of capital at 8 C.F.R. 204.6(e), however, requires that indebtedness, such as a promissory notes, must be secured by assets of the alien investor. To accept a promissory note as the requisite capital investment where the security interest is not perfected is tantamount to accepting an unsecured promissory note. As stated in Matter of Hsiung, supra, "[m]erely 'identifying' assets as securing a loan, without perfecting the security interest, is not meaningful since the note holder cannot be assured that the identified assets will remain available for seizure in the event of a default." In this case, the assets purportedly securing the promissory note were those of the petitioner's mother, not the petitioner. The funds were not placed into any type of escrow account or other guaranteed financial instrument to secure the promissory note. Nor is there any evidence that the real property has in any manner been attached as security for the note. Under these circumstances, it must be concluded that the director's finding rejecting the unsecured promissory note was correct and the petitioner has not overcome that finding.

The next issue to be examined is whether the petitioner adequately documented the source of his investment funds and established that the funds were obtained by lawful means.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

In the instant case, the petitioner indicated that he is a student and that his initial investment capital of $300,000 was a gift from his mother. The director found that there was no evidence of the gift, such as payment of gift taxes on the $300,000, and that he did not document the source of the mother's funds, such as her tax returns, as required by the regulation.

On appeal, counsel argued, in pertinent part, that:

The source of the funds was a gift, which is a lawful source. The fact that the petitioner did not provide any evidence of payment of gift tax or any other reporting or tax obligation is irrelevant. In fact, even if the petitioner were an admitted willful tax evader, he may be ineligible to receive his green card for committing a crime involving moral turpitude, but if the source of his funds were legal, he would have met the requirement of 8 CFR 204.6(j)(3).

* * *

Furthermore, the petitioner is not required to show the "source's source of funds." This is equally true if the petitioner's funds came from profits he received in his business. He need not show that his customers lawfully

> obtained the funds they used to pay him, but only that he lawfully obtained the funds from his customers.

Counsel's arguments are not persuasive. Merely asserting that the investment capital was a gift from a relative does not satisfy the "lawful source of funds" provision and does not meet the evidentiary standard set forth in Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The above regulation clearly requires documentary evidence to establish the source of funds. The fact that the funds are claimed to be a gift from a family member does not relieve the petitioner of those documentary requirements. 8 C.F.R. 204.6(j)(3)(iii) explicitly requires evidence of the source of the capital, not merely the existence of the capital. The petitioner did not provide any verification of that the funds were a lawful gift. It was claimed that the petitioner's mother is a lawful permanent resident of the United States. Therefore, a cash gift from her to her son would be subject to U.S. gift taxes. Her U.S. federal income tax returns would also be available to document the source of the funds she transferred to the petitioner. Despite counsel's objections, the submission of copies of the petitioner's and the petitioner's mother's past tax returns is an entirely reasonable requirement of the regulations and does not appear to be too onerous a burden in this proceeding. However, no additional evidence to document the source of the investment capital was provided on appeal. Therefore, it must be concluded that the petitioner failed to overcome the director's objection.

Furthermore, in the case of a new commercial enterprise involving multiple investors, it is incumbent on each petitioner to identify the source of all investment capital and demonstrate that it has been obtained by lawful means.

8 C.F.R. 204.6(g)(1) states, in pertinent part:

> The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.** (Emphasis added.)

Based on the petitioner's assertions, [redacted] total capitalization will come from a total of 30 to 40 alien investors. The petitioner bears the burden to identify the sources of all of these funds and to establish that they were derived by lawful means. The petitioner has not furnished evidence addressing this requirement with the petition.

The next issue to be examined is whether the petitioner's investment has resulted in or would result in the requisite employment creation.

8 C.F.R. 204.6(m)(7) states:

> An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.
>
> (i) *Exports.* For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States.
>
> (ii) *Indirect job creation.* To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

8 C.F.R. 204.6(j)(4)(iii) states, in pertinent part:

> To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports.

The petitioner asserted that he is in the process of investing $500,000 in [redacted] To satisfy the job creation provision the petitioner submitted a copy of the General Partner's, [redacted] business plan.

The director found that the business plan was insufficient in that the petitioner had not shown evidence of any concrete business activity, such as contract negotiations or identification of potential clients for [redacted] lending activities. The director

therefore concluded that the petitioner had not adequately demonstrated that the requisite job creation would occur.

On appeal, counsel argued that the business plan contained a variety of projections and potential investments, but that business activity had not commenced pending approval of the visa petitions and the release of the funds from escrow.

On review, it is concluded that the [redacted] comprehensive business plan is insufficient to establish that the requisite level of indirect employment creation will occur. The General Partner's business plan provides a brief review of the history of the military base closures and provided an overview of California's strategy to convert those facilities to commercial use. It was stated that the strategy being employed is to convert the former military airport facilities to air cargo service and to convert the surrounding areas to manufacturing and transportation that will take advantage of the air cargo service. The business plan merely expresses an intent on the part of the Partnership to loan funds to one or more of the 350 economic development agencies said to be addressing the military base closures in California. The economic development agencies would then provide unspecified financial assistance to private companies seeking to locate in one of the affected areas. Those private companies would then engage in business activity, some portion of which may involve exports, and employment would be indirectly created through the increased economic activity.

The petitioner, however, failed to identify any economic development agency that is specifically dedicated to export programs and has failed to identify any such agency that is seeking financial assistance from a private lending source. The petitioner advanced the claim that [redacted] has a plan to establish a "medium" by which it would commence doing business. The petitioner did not submit this "plan" or identify the "medium" that is to be established.

Furthermore, in section III(A) of the business plan it was stated that:

> Each base reuse plan shows the existing airport facilities to be designed as air cargo facilities. By nature air cargo is export.

The petitioner's contention that air cargo is export-related by its nature is an unsubstantiated generalization. Certainly the vast majority of air cargo in the United States, and in California, is domestic in nature. The petitioner presented no evidence demonstrating that any of the state agencies, any of the airport facilities, or any of the industries planned around the airport facilities will be focused exclusively on exporting goods from the

United States. In order to satisfy the burden of proof, the petitioner must do more than merely express intent to invest in a governmental agency seeking to promote a certain type of business activity. See 8 C.F.R. 204.6(j)(2). The petitioner did not satisfy his burden of proof.

In Matter of Ho, I.D. 3362 (Assoc. Comm., Ex., July 31, 1998), the Associate Commissioner set forth minimum standards for a qualifying business plan on which to base an immigrant investor visa petition.

> A **comprehensive** business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible. (Emphasis added.)

The General Partner's "Comprehensive Business Plan" does not meet this standard. The plan does not identify any specific projects in which it seeks to invest. Nor does it present a detailed description of the alleged strategy whereby it will provide "loans" to the regional development authorities. Based on the stated claim that the General Partner plans to oversee an investment of up to 40 million dollars into long-term profit-generating activities throughout the State of California that would result in the creation of at least 400 permanent full-time jobs, the absence of a truly "comprehensive" business plan, conforming to standard business practices, is inexplicable. Accordingly, the petitioner has failed to establish that the investment would result in the requisite employment creation.

In addition, to establish indirect employment creation, a petitioner may rely on "reasonable methodologies." Section V of

the business plan discusses export sales and methodologies for forecasting indirect job creation. The section discusses some of the proposed redevelopment plans for the former air bases. It also contains the conclusion that one job would be created for approximately each $60,000 of investment capital. Even accepting the general statistical formula espoused in the referenced document, the petitioner's proposed investment of $500,000 would result in only 8.3 jobs; not the minimum of 10 jobs required.

Additionally, the statistical formula reflected in the business plan does not rise to the level of a "reasonable methodology" contemplated by the regulation. The petitioner failed to disclose the source of the formula and failed to show that it was a generally accepted principle in the regional economic forecasting of the concerned California development agencies. It is not necessary for the petitioner to commission an independent economic review and employment forecast. It is necessary for the petitioner to provide a comprehensive description of the Partnership's intended investments and provide copies of pertinent economic analyses conducted by appropriate government authorities that include a forecast of job creation resulting from various anticipated investment levels. The petitioner has failed to provide documentation that would meet this standard - documentation that is readily available in any comprehensive economic development planning program. In the absence of clear evidence identifying the specific agencies to whom the petitioner would loan money, evidence that those agencies would focus on export related development, and evidence that exports would then increase and stimulate the requisite employment creation it cannot be said that the petitioner has satisfied his burden of proof pertaining to this requirement.

In the absence of indirect employment creation, the petitioner must demonstrate direct employment creation. In this regard, it must be noted that the business plan is that of the General Partner, [redacted] There is no indication that the Partnership, [redacted] has hired or will hire any direct employees. Therefore, the petitioner has failed to demonstrate that her investment would create any direct employment.

While not discussed in the director's decision, there are additional provisions under which the petitioner failed to establish eligibility. The first is the issue of the minimum capital investment required.

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(f) states, in pertinent part, that:

> *Required amounts of capital.* (1) *General.* Unless otherwise specified, the amount of capital necessary to make of capital necessary to make a qualifying investment in the United States is one million dollars ($1,000,000).
>
> (2) *Targeted employment area.* The amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is five hundred thousand dollars ($500,000).

8 C.F.R. 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
>
> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
>
> (ii) In the case of a high unemployment area:
>
> (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
>
> (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

In a memorandum accompanying the Form I-526, the petitioner's representative claimed that the Partnership will invest in economic development projects serving three California counties impacted by the closure of United States military bases in those counties. The projects focus on converting the former military airport facilities

to commercial use. Counsel asserted that the impacted counties qualify as targeted employment areas. It was stated that:

> the employment creation will occur in Riverside, Sacramento and San Bernardino counties in California, within a "targeted employment area" according to § 203(b)(5)(B)(ii) of the Immigration and Nationality Act. (See exhibit 6, for State designation).

The referenced Exhibit 6 consisted of a one-page typed table listing the three counties and stating their "qualifying rate" was 9.6 percent, 11.3 percent, and 9.6 to 12.4 percent, respectively, and stating the national unemployment rate was 5 percent. Also submitted were excerpts of a publication by the [redacted]" The submission included a map of California titled "Qualifying Counties" and a table of cities and counties with corresponding unemployment rates compiled from 1995 annual average unemployment rates.

It is concluded that the petitioner failed to demonstrate that the three counties where the Partnership will be doing business qualify as targeted employment areas. Targeted employment areas are defined as rural areas or an area which has experienced unemployment of at least 150 percent of the national average. 8 C.F.R. 204.6(e). 8 C.F.R. 204.6(j)(6)(ii) sets forth the documentary requirements for demonstrating that the investment will occur in a high unemployment area.

First, the petitioner did not furnish a letter from an authorized official of the state or county governments certifying that the counties were designated high unemployment areas pursuant to 8 C.F.R. 204.6(j)(6)(ii)(B). 8 C.F.R. 204.6(i) requires that such a letter from an authorized state official include a description of the geographic boundaries of the designated area and a description of the method by which the statistics were obtained. The petitioner did not satisfy this documentary requirement.

Second, the petitioner did not submit adequate evidence establishing that the counties qualify as high unemployment areas pursuant to 8 C.F.R. 204.6(j)(6)(ii)(A). The typed table of data is on plain paper and cannot be determined to be from any official source. It does not contain a citation of the source from which the data were compiled and does not indicate the year from which the data were compiled. Therefore, this document is not dispositive. The map and the tables from the State publication submitted by the petitioner do not support the claim that the counties qualify as targeted employment areas. The map, in fact, reflects that San Bernardino and Sacramento counties had unemployment rates below the target of 8.4 percent and thereby were not qualifying counties with 150 percent of the national unemployment rate in 1995. The accompanying table consists of a

partial breakdown of the county unemployment data by selected cities; however, the petitioner did not submit information identifying the geographic location of the affected airport facilities where the capital investments will occur. Therefore, the Service is unable to determine what the unemployment rates were in the geographic or political subdivisions contemplated by the petitioner as targets for investment.

Finally, the California data were based on 1995 unemployment data. The Partnership was established in December 1997 and the petition was filed in January 1998. In order for an investment to qualify for the reduced capital investment in a targeted employment area, the petitioner bears the burden to submit evidence establishing that the areas were designated as high unemployment areas as of the time of filing. Matter of Soffici, I.D. 3359 (Assoc. Comm., Ex., June 30, 1998). The submission of data from 1995 does not meet this burden in the absence of a showing that data from 1995 were the most recent data available in 1998.

In addition, the petitioner's documentation indicates that the State of California has conducted extensive economic development programs to address the economic impact of the base closures since 1988. It is reasonable to assume that the State's efforts have had some degree of success and had reduced the unemployment rates of those areas as of the date the petition was filed. For this additional reason, it is incumbent on the petitioner to provide unemployment statistics from the year most closely associated with the date the petition was filed.

Based on the documentation furnished by the petitioner, it cannot be concluded that the three counties, or the relevant political subdivisions of those counties, qualify as targeted employment areas with unemployment rates of at least 150 percent of the national average. Therefore, the amount of capital necessary to make a qualifying investment in this matter is $1,000,000, rather than $500,000 as stipulated by the petitioner.

While also not discussed in the decision of the director, an additional issue to be examined is whether the petitioner has established a new commercial enterprise.

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of:

(1) The creation of an original business;

(2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or

(3) The expansion of an existing business through the

> investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 C.F.R. 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 C.F.R. 204.6(j)(4)(ii).

According to the plain language of § 203(b)(5)(A)(i) of the Act, a petitioner must show that he or she is seeking to enter the United States for the purpose of investing in a new commercial enterprise that "the alien has established." A petitioner must establish eligibility as of the date the petition was filed. Matter of Katigbak, 14 I&N Dec. 45 (Comm. 1971).

In this matter, the new commercial enterprise on which the petition is based is [redacted] The record shows that the organizing documents for the General Partner were filed with the California Secretary of State on January 19, 1997. The record also contains a California Certificate of Limited Partnership for [redacted] dated December 1, 1997. The Certificate, however, does not contain an endorsement showing that it was formally filed with the California Secretary of State. Absent proof of formal registration with the appropriate state authority, the petitioner has not demonstrated that [redacted] has, in fact, been "established." The petitioner and his counsel, however, made written statements acknowledging December 1, 1997, as the formation date of the Partnership. The Form I-526 petition was filed on January 6, 1998.

In describing the Partnership as the new commercial enterprise, the petitioner submitted a list of eight limited partners, including himself. It was also stated in the document that the General Partner holds 55 percent ownership of the Partnership and that the limited partners, as a group, hold the remaining 45 percent. In an accompanying letter, counsel stated that the General Partner planned to recruit a total of 30 alien investors as limited partners in [redacted], although the Partnership's business plan calls for a total of 40 alien investors. The business plan also stated that only foreign nationals will be considered for admission to the Partnership.

The petitioner submitted an English-language document titled "Investment Agreement and Power of Attorney" wherein he agreed to

become a member of the Partnership and agreed to the capital contribution provisions. Section 1(C) of the investment agreement provides:

> The Partnership has agreed to accept and admit me as a Limited Partner upon (a) my execution of the relevant documents, (b) the approval of my petition for classification as an alien entrepreneur, (c) the approval of my visa application either by the U.S. Department of State (in the case of consular processing abroad) or the Immigration and Naturalization Service (in the case of adjustment of status within the United States), and (d) the receipt of my initial cash payment capital as provided herein.

The evidence submitted does not demonstrate that the petitioner established [redacted] within the meaning of 8 C.F.R. 204.6(h)(1). First, the petitioner has not adequately shown the date on which the Partnership was formally established in the State of California, or, for that matter, that it has been established. Second, the act of signing the investment agreement, in and of itself, did not admit the petitioner as a limited partner. Pursuant to the investment agreement, the petitioner's admission to the Partnership is contingent on the occurrence of four events: execution of the relevant documents, making the initial cash payment, approval of the visa petition, and admission as or adjustment to United States permanent resident status. As the petition has not been approved and the alien has not been admitted as a lawful permanent resident, the alien is not yet a limited partner of [redacted] A petitioner cannot be said to have established a business where there is no actual ownership interest in that business. Therefore, it cannot be concluded that the petitioner established a new commercial enterprise within the meaning of the Act.

Moreover, in a business venture of this type, the Limited Partnership is conceived of and developed by the General Partner. The General Partner then recruits investors to serve as limited partners. In this case, the General Partner has stated its intent to recruit 30 to 40 alien investors thereby assembling capitalization of $20 million. In order for all 40 alien limited partners to satisfy the "establishment" provision of § 203(b)(5) of the Act, wherein the limited partnership is presented as an original business pursuant to 8 C.F.R. 204.6(h)(1), the General Partner must complete its recruitment of those investors prior to "establishing" the Partnership. See also Matter of Izumii, supra.

There are additional provisions whereby investors may satisfy the establishment requirement by investing in an existing business. 8 C.F.R. 204.6(h)(2) provides that an alien investor may demonstrate that he or she has purchased an existing business, and restructured or reorganized that business, such that a new enterprise results.

8 C.F.R. 204.6(h)(3) provides that an alien investor may demonstrate that he or she has invested in and expanded an existing business with the result of a 40 percent increase in the net worth or the number of employees of that business. It would be difficult, if not impossible, for a petitioner in a limited partnership, where partners join sequentially, to satisfy either of these requirements.

Due to the inherent nature of a limited partnership, no individual partner or partners purchase the business in its entirety and therefore could not satisfy the establishment requirement under 8 C.F.R. 204.6(h)(2). Additionally, merely adding investment capital to an existing business would not result in any restructuring or reorganizing of the business. If the business were restructured or reorganized so that a new business resulted, it would negate the business plan of any existing investors.

In a limited partnership of three or more investors, each of whom invest the same amount of capital, subsequent investors do not satisfy the establishment requirement by expanding an existing business by at least 40 percent as required under 8 C.F.R. 204.6(h)(3). An existing business is made "new" by virtue of a substantial increase in its net worth or in its number of employees. In order for a pre-existing business to be made new, the pre-existing business must have been fully functioning and doing business. The petitioner must also demonstrate that the "new business," that is the business after the requisite level of expansion, had occurred as of the filing date of the petition. Each investor, therefore, must demonstrate that the requisite 40 percent expansion of the business had already occurred as of the filing date of the petition and that the expansion was the result of his or her individual investment. In this case, each and every one of the 40 investors who had not participated in the original establishment of [redacted] would have to demonstrate that the business was expanded by at least 40 percent as of the filing date of their individual petitions.

It is further noted that Service records [redacted] reveal that the petitioner filed a second I-526 petition on June 15, 1998. That petition is based on a second $500,000 investment into [redacted] The limited partnership was registered in the State of California on March 30, 1998. The record does not indicate whether this represents a second business investment by the petitioner, or whether he removed his deposit from [redacted] and deposited the same $300,000 into [redacted] The record also does not indicate whether [redacted] still exists or whether it was dissolved. If the petitioner terminated his investment on which the instant petition is based, it is incumbent on him to withdraw his appeal of this petition prior to filing a second petition based on the investment of the same capital.

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because he has failed to meet the capital investment minimum of $1,000,000, has failed to demonstrate that he has established a new commercial enterprise, has failed to show that he has made a qualifying at-risk investment in a new commercial enterprise, has failed to establish the source of his investment capital and that it was obtained through lawful means, and has failed to demonstrate that the investment will result in the requisite employment creation. For these reasons, the petitioner has failed to overcome the decision of the director.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The previous decision to deny the petition is affirmed. The petition is denied.